No. 481324

Court of Appeals, Division II
State of Washington

Araceli Felix , Appellant

vs.

Luis Melendez, Respondent

Respondents Reply Brief

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A. Assignments of Error

Introduction

This appeal follows a lengthy trial on a family law parenting plan relocation request filed by the respondent, which was tried simultaneously with a petition to modify custody filed by the Appellant. Appellant Araceli Felix has raised five assignments of error, none of which clearly delineates alleged factual errors by the trial court.

Luis Melendez has raised no counter issues on appeal.

Issues Pertaining to Appellant's Assignments of Error in Order according to Appellant's Brief:

1. The relocation laws in Washington State are presumptive.

2. The appellant states that there were no restrictions to safeguard the children. The Guardian Ad litem specifically recommended that there be no unsupervised contact between the children and the mother's boyfriend Virgilio Martin Rodriguez on the original parenting plan. Not written as required by rule 10.3(a) and (g) on Appellants brief.

3. The parenting plan entered was not on the recommendation of the GAL. The GAL was only to determine if there was evidence to support a major modification. The new parenting plan came from the relocation case. (VBR at pg. 23)

4. The respondent cannot find specifics to what appellant is referring to so is forced to ignore this numbered section in her trial brief (Appellants brief pg. 4 #4)

5. The trial court did not err when denying the motion for reconsideration based upon hearsay and lack of evidence, not to mention, religion is a joint decision in the parenting plan.

Other Issues pertaining to the appellant's assignment of error:

The findings of fact were in the oral rulings.

Rather than contravening the traditional presumption that a fit parent will act in the best interests of the child, the relocation statute establishes a rebuttable presumption that the relocation of the child will be allowed. Thus, the act both incorporates and gives substantial weight to the traditional presumption that a fit parent will act in the best interests of her child. The burden of overcoming that presumption is on the objecting party, who can prevail only by demonstrating that the detrimental effect of the relocation upon the child outweighs the benefit of the change to the child and the relocating person. RCW 26.09.520. In relocation cases the trial court must consider each of the factors in RCW 26.09.520 and document its findings in the findings of fact or, failing that, the record must reflect that substantial evidence was entered on each factor and the court's oral ruling must reflect that the court considered each factor. In re Marriage of Kim, 179 Wn. App. 232, 240-41 (2013)

The trial court did not err in failing to enter such findings because substantial evidence was presented on each factor of the relocation and modification statues. And again, the appellant was the one who had the burden to present the facts on all the statues and she simply chose not to. Reading the VBR it is very clear that she was side tracked on trying to prove other things that were irrelevant or what she thought to be helpful to her boyfriend's restraining order cases.

The appellant is also alleging abuse of discretion. Abuse of discretion is generally defined as discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971).

An appellate court will not ordinarily substitute its judgment for that of the trial court even though it might have resolved the factual dispute differently. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 73 P.3d 369 (2003). The trial court is generally free to believe or disbelieve a witness in reaching factual determinations. State v. Chapman, 78 Wn.2d 160, 469 P.2d 883 (1970)

The party challenging the findings of fact "bears the burden of demonstrating that substantial evidence does not exist." In re Marriage of Grigsby, 112 Wn. App. 1, 9, 57 P. 3d 1166 (2002). This has not been done in the appellants brief or supported by the record

There was also no evidence to support a major modification of the parenting plan. (VBR at 23-29) RCW 26.09.260 Modification of parenting plan or custody decree. The court shall not modify a prior custody decree or parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the

circumstances of the child or the nonmoving party and that the modification is in the best interest of the child and is necessary to serve the best interests of the child. Guardian ad litem reports dated June 11 and August 12, 2015 both state that his recommendation is to deny the petition for major modification of the parenting plan. In her brief, the appellant makes no statements in the assignment of error or issues pertaining to assignment of error sections about the modification of the parenting plan rulings. The court favors the stability of the children.

The fact pattern in the case is similar to the Marriage of McNaught, 189 Wn.App. 545 (2015), wherein the appellant father challenged a granted relocation request and asked the court to reexamine the trial court evidence and reach a different conclusion. The McNaught court rejected this approach.

B. Counter to Appellant's Statement of the Case

In the pending appeal, Ms. Felix seeks review of several post-dissolution orders entered by the trial court, however, her statements were argumentative and a vast portion of her information was not relevant to the issues presented for review. The finding of adequate cause and the appointment of the Guardian ad litem are not subject to review nor where those orders challenged or appealed by the petitioner via motions to the court timely.

Ms. Felix had the burden of proof for both of these cases which she failed to meet at trial and now is using her brief in this appeal to try and add information to the record.

The respondent did not choose to petition the court of appeals for a motion to strike portions of Ms. Felix's brief. Instead, the respondent is choosing to address this issue in this reply brief rather than filing a separate motion to strike to save time and resources without diminishing the quality of the decision-making process.

In the case of Res Judicata, the matter cannot be raised again. The following items from Appellants Brief section IV page 5-23 should be stricken because they have already been ruled on prior to the modification and relocation hearings or other reasons stated herein.

1. Pg 5- 11 – The whole of section A & B. "GAL Report #1 and GAL Report #2." This was ruled on at the trial in July 2013 by Judge Lisa Sutton, who heard the true facts and history of this case. She ruled that the father be the custodial parent and restriction placed on the petitioner's, then exposed boyfriend, Virgilio Rodriguez for concerns of domestic violence against women and children. This is not an opportunity for the petitioner to color the facts, defend her boyfriend, or to complain about the prior rulings which are not subject to this appeal.

2. Pg 11 Section C " GAL Report #3

   Paragraph 1: This whole paragraph would fall under the same objections for Section A & B. Section titled "Emily" and "Allison" pg 12 – This is subject to the hearsay rule, no supporting evidence- rule 10.4, and appellant is referring to accusations she is making after the trial decisions dates. This appeal is not an opportunity for her to present new false claims to this court.

3. Section C "GAL Report #3" pg 15. "To the GAL it is more important..." and on pg 17 " Apprently to the GAL..." I object to these paragraphs because it is speculation and not based in fact or supported by evidence.

4. Section C "GAL Report #3" pg 15 "When the children lived with the mother...did not have her license." These sentences show no merit to her appeal and no facts to support her claims. This was also ruled on in the July 2013 trial.

5. Section C "GAL Report #3" pg 15-16 "The GAL claimed...important member in their family deploys." Again this is speculation, there are incomplete school records, and appellant is elevating her boyfriend's status above the children's father, and confusing the court with unnecessary commentary.

6. Section C, Number 3, Pg 17 "CPS Report."

   Appellant states that "... She [Mrs. Paillet] stated that she spoke to the GAL but he seemed bias against the mother. He clearly showed he had invested time in helping Mr. Melendez obtain and maintain custody of the children." I could not find any place in the record where the CPS worker states this statement nor did the appellant put any reference to the record where this is stated. This is hearsay and should be stricken from the record.

7. Section C where ever the appellant sites the verbatim report. Respondent has notice that these sections are not fully copied and pasted in the brief but tailored to fit her needs and parts are not accurate when put side by side to the VRB.

8. Section C, 4. "Relocation" pg 20-23 Appellant is using this opportunity to try to argue the relocation case over again by trying to use the appeal as an opportunity for her to present her case over again when she did not present it at the trial. Appellant puts no references to where the appellant actually states these things in court or in records.

9. Section C, 4. "Relocation" pg. 23 last paragraph. No evidence to support her claim. Hearsay.

10. "Father's Abusive history" pg16 of brief: The appellate was trying to bring in evidence that was not litigated in the original divorce proceedings when she stated under oath that she was aware of her complaints at the time of the divorce and trial. VBR at 214.

A. Background History July 2013 – September 2014

The dissolution of marriage was filed by the petitioner on March 8, 2012. The matter was set for trial on July 1st and concluded on July 5th, 2013, naming Luis Melendez the custodial parent of the party's two children. Right out of the gate there was a contempt motion filed by Araceli Felix for her two weeks uninterrupted visitation after her failing to go to mediation regarding this matter when requested because of the time limits due to the change of custody near the end of summer. The contempt was upheld but never to the extent of parental interference. The respondent chose not to appeal. On August 1, 2013 Araceli Felix appealed both the parenting plan and the child support orders. The mandate dismissing the request for appeal of the parenting plan and child support order was entered on December 11, 2013. December 4, 2013, just a few days after Araceli Felix's boyfriend

Virgilio Rodriguez was served with a protection order against his wife and kids, Araceli Felix put a motion for Modification of the parenting plan the next day asking the court to lift the restrictions against Mr. Rodriguez and the children of this case, and placing restrictions on Amica Santiago and Jessica Rodriguez to not be left alone with the children with no basis other than retaliation. Subsequent filings by Araceli Felix continued: Motion and declaration for an order to show cause on December 23, 2013, motion and declaration for ex parte restraining order January 14, 2014, After the first modification petition was denied – she put in another petition entered on February 25, 2014 and a motion and declaration for ex parte restraining order on February 25th, 2014. Ms. Felix had been in and out of the court 11 times since early November 2013, making false claims of abuse and requesting modifications. On March 27, 2014 the court ordered that the parties attend mediation to discuss custody and visitation matters. When the parties came before the court on May 13th, 2014, Ms. Felix indicated that she was not participating in mediation with Mr. Melendez. After this hearing, Araceli Felix swiftly took the oldest child to a counseling session and sat in on their session for the first time without permission. The child spontaneously mentioned Amica Santiago put a bruise on her arm but when Ms. Felix was out of the room she had a different story. On May 19, 2015 Araceli Felix waited for an unfamiliar judge and proceeded with an ex parte restraining order which was unfortunately granted, but with restrictions on Mr. Rodriguez NOT being in the home. On May 27, 2014 the respondent agreed that it was in the children's best interest to move forward with the modification order to investigate the appellant's mental status due to her excessive litigation and her repeatedly making false claims of child abuse by coaching the children to make false claims while in her control. Each and every incident to this day has been

determined to be unfounded by the court, child protection services, and the guardian ad litem so something else has to be wrong. Although the request was for a full psychological exam, due to the cost, it was ordered that Ms. Felix obtain a mental health exam, and Mr. Melendez agreed he would do one as well for good measure. Also, The Guardian ad Litem Richard Bartholomew was reappointed, and the restraining order was denied. The orders were officially entered on July 1, 2014. Then came the period of calmness for a few months.

Mr. Melendez's mental health exam was entered on 11-12- 14 and Ms. Felix's was entered 11-24- 14.

Mr. Virgilio Rodriguez's restraining order was renewed January 2015. Ms. Felix retained a lawyer in February 2015 and for an unknown reason he recommended a drug and alcohol assessment which was entered to the record on March 16, 2015.

On April 17, 2015 Mr. Melendez put in a notice for the relocation of the children. Araceli's boyfriend went into Domestic Violence treatment shortly after this. On May 1, 2015 there was an objection to relocation filed by Ms. Felix's lawyer and a response was entered along with a motion for temporary relocation on May 12, 2015 by Mr. Melendez. After the April 17, 2015 the false allegations and inappropriate involvement of the children resurfaced and escalated while they were in Araceli Felix's care.

There was a hearing on May 22, 2015 in which Araceli Felix's lawyer misguidedly informed the court of a pending CPS investigation. There was no CPS investigation. The court affirmed that a relocation is in and of itself a modification of the parenting plan and there was no restriction on Mr. Melendez to not continue with his relocation petition. The judge also ruled that the petition was not made in bad faith, and that it is not wrong to

anticipate and plan for a layoff. However, it was ordered that the guardian ad litem complete his report before the children relocate.

The GAL report was entered on June 11, 2015 stating that there is no ongoing CPS investigation and no findings of abuse. The GAL's recommendation is that the petition for a major modification should be denied. On June 25, 2015 the children were allowed to be relocated to Florida with the Father. On August 12, 2015 the GAL provided a supplemental report after the relocation, which again stated that the petition for a major modification should be denied. He was ordered not to look into the aspects of relocation.

The Children were relocated on the temporary order after a summer visitation with the appellant on July 20, 2015. The final order granting permanent relocation and denial of the major modification petition was entered September 2015.

B. Background March 2012 – July 2013

This section is added due to the continuous references the appellant refers to in her brief prior to the the July 5, 2013 trial. Respondent understand that it would be hard for the court to "unread" what the appellant wrote.

The parties were married on October 5, 2007 in Killeen, Texas. The parties separated on/or around April 1, 2011, after nearly four years of marriage, when the respondent deployed with the National Guard. The respondent met the petitioner while parties were on active duty in Korea during 2006. The petitioner became pregnant with parties first daughter, December 2006. The petitioner was stationed from Korea to Joint Base Lewis McChord in February 2007. Respondent was stationed in Fort Hood, TX during

2007. On August 27, 2007 the party's first daughter was born. The parties were married. As a result of being married the military started to determine how to get both parties reassigned to the same base or which one or both parties to release from active duty. On May 24, 2008 the military released respondent from active duty. Respondent then moved to Pierce County to be with the petitioner and their child. The petitioner left the Military around May 2009.. She continued on unemployment and extended unemployment. The petitioner applied for VA disability based upon anxiety and depression shortly after. During the party's marriage the petitioner would drink excessively. During the parties marriage they experienced a number of problems. The parties frequently had arguments over money issues. The petitioner would not pay the bills and the money would simply disappear.

In February 2010 the petitioner's brother past away. He resided in Tacoma. He overdosed huffing Dust-off. His death caused the petitioners to suffer further depression. As a result of this situation respondent's mother came from Connecticut to help out. The petitioner has virtually no family because of growing up in the foster care system. The petitioner was simply unable to function and to care for the children or for herself. Petitioner's application for VA disability benefits was approved on around April/May 2010. She received an 80% VA disability rating. The disability rating was based upon anxiety and depression. The petitioner was pulled over and arrested for DUI on or about October 25, 2010. She did not obtain a current license until early 2013.

On February 15, 2011 respondent was deployed with the Washington National Guard to Kuwait. Shortly after the respondent's deployment to Kuwait the respondent saw pictures of the petitioner and her new boyfriend on Facebook. Shortly after the respondent left deployment to Kuwait, the petitioner sent the children to stay with the respondent's mother in Connecticut. In fact, they were with the children's grandmother in Connecticut from April through June 2011. The petitioner did eventually pick up the children from the respondent's mother. The respondent was concerned because when he was deployed in Kuwait he had extreme difficulty contacting the petitioner. The petitioner simply would not answer most of the respondent's phone calls.

In August 2011, the petitioner came to our family home with her boyfriend Virgilio Rodriguez, and emptied the house of almost all items including appliances while I was still deployed. The petitioner then rented a home with Mr. Rodriguez in Olympia, WA, which is over 25 miles away from the family home. The petitioner limited contact with the respondent after this time. In an email dated November 21, 2011, the respondent states that "Your not allowed to talk to the girls anymore. I'm going to create some space between you and the girls....All I can do is create distants between you and them....I'm not going to allow you to speak with them or see them. Even when you get back unless you have a court order forcing me to let you see them." Respondent returned from deployment to Fort Hood, TX on January 24, 2012 for debrief. The respondent returned to Washington State on February 24, 2012.The respondent was not permitted contact with the children until after a March 2012 hearing.

The respondent hired legal counsel hoping to enforce his parental rights and to maintain his custodial and parental relationships with his children. After a hearing on April 4, 2012, during which discovery was presented concerning Virgilio Rodriguez, his past, and his true relationship with the petitioner, the respondent was granted visitation with the children every weekend and phone contact daily. Prior to returning home from deployment relatives sent the respondent pictures of the petitioner with a new boyfriend. In March 2012, the respondent obtained a name from a filed receipt in the party's dissolution hearing paperwork. The petitioner fabricated a story stating that Virgilio Rodriguez was only her roommate and that he would be moving out soon. Prior to an April 2012 hearing the respondent's lawyer ran a background check on the name listed on the receipt, Virgilio Rodriguez. There were multiple hearings for domestic violence against his still current wife and children. In court, the commissioner told the petitioner that her "roommate" needed to move out of the home immediately because of his history.

The respondent noticed around July, 2012 that the petitioner was pregnant with a third child. A month, later she presented with a newborn.

Allison, the party's oldest daughter, started school in September, 2012 in Kindergarten. The respondent pulled her school attendance records in January 2013, and Allison had been tardy or absent to school 30% of the time. The respondent brought this up to the guardian ad litem and recorded his concerns in a declaration. The petitioner's home is less than 1 mile away from the school. Starting in March, 2013, Allison's attendance started to improve, over a month after the discovery was presented to the petitioner.

About two weeks before school ended, Allison's teacher approached the respondent to address concerns over Allison's behavior over the last few weeks. The teacher stated that Allison was displaying unusual behavior; crying in class, and isolating herself from her friends and school work. The respondent expressed the same concern; telling the teacher she has been additionally soiling herself. The teacher asked if there had been any changes in our situation and it was mentioned that the petitioner's boyfriend, Mr. Rodriguez, had been back into the petitioner's home as of late April. The teacher was asked to provide an email to the respondent to serve as record. School ended on June 13, 2013.

Virgilio Martin Rodriguez was deployed around November, 2013. The children subsequently presented with substantially less "unknown" bruise marks. The children started to speak very fondly of Mr. Rodriguez while he was deployed. Upon his return in late April, 2013 the children said not a word about Mr. Rodriguez from that point on. Petitioner was pregnant with her 4th child at the time of the final trial.

Pursuant to the past court orders in this case, the respondent was awarded residential time with his children. Unfortunately, the initial award was because of the petitioner's first restraining order attempt. This first attempt was made on March 8, 2012 in conjunction with the petitioner filing for dissolution of marriage. The respondent's residential time initially occurred at the local McDonalds and supervised by the petitioner for a diminutive 4 hours a weekend and phone contact daily due to the petitioner lying about being afraid the children would be removed from the country. A short few weeks later, she made another attempt at obtaining a restraining order March

21, 2012, this time with the help of her "roommate" and an almost completely falsified police report. The result of this order prompted supervised visitation by a person other than the petitioner and Mr. Rodriguez. Unfortunately, at the time of the hearing, they did not address my mother's temporary restraining order the petitioner obtained. On a Friday night, after the restraining order came into effect, the petitioner contacted the police. What was unknown at the time was the restraining order against the respondent's mother included our minor children. The respondent's mother was arrested in front of both children. The respondent's mother was retained for the remainder of the weekend and on the following Monday the Order of Protection petition was dismissed. A temporary order filed on April 4, 2012 awarded unsupervised visitation to the respondent, every weekend, from Friday to Sunday.

On January 23, 2013 the father filed a volunteer packet and had lunch with their oldest child at her school. A request was made to also take the party's youngest daughter to lunch but was denied via text message. The respondent filed a motion for temporary restraining order two days later, again, making false accusations, such as the respondent making an attempt to take the children out of the country. The petitioner requested minimal, supervised visitation. The judge who presided over this matter in court was very upset at the petitioner, and did not see what was wrong with the respondent having lunch with their daughter at school.

On April 4. 2012, a guardian ad litem was authorized for our children. Mr. Bartholomew put out his first report on August 17, 2012, recommending the petitioner

to be the custodial parent and the respondent to have liberal visitation. However, Facts were willfully being held from the Guardian ad litem to prevent the discovery of the petitioner's boyfriend's past. Additionally, the petitioner was failing at her responsibilities to provide educational and medical support to the children.

On December 19, 2012, the petitioner filed a response to the guardian ad litem report.

On January 24, 2013, the respondent filed his response to the guardian's report outlining all of his concerns with the report.

On January 29, 2013, the petitioner filed another declaration stating at the conclusion, "I honestly believe that Virgilio and I are the better parent.... I hope that you trust in Mr. Bartholomew knowledge and high credential."

On January 30, 2013 there was a hearing re: the guardian ad litem's recommendations. The result of this hearing, at the request of the petitioner, included decreased phone visitation to only twice per week. Also, the addition of a week day visitation for the respondent and one weekend per month for the petitioner.

Between November and the end of May the respondent's became increasingly suspicions that something was not right in the petitioner's household and the guardian also had many concerns with the petitioner. This prompted the respondent's request for a hearing for temporary custody submitted with multiple documents of evidence and observations. The hearing was set for April 8, 2013. The petitioner was served on March 30, 2013. The petitioner's response was served to the respondent, late, at the day of the court hearing, and was filed on April 4, 2013. The Guardian ad litem

responded to the motion on March 28, 2013 stating that he would be unable to attend due to a planned vacation out of the county. The order for temporary custody was denied due to failure to show adequate cause. There was, however, an addendum to the visitation schedule to include having the receiving parent pick up the children. Mr. Rodriguez was still deployed at this time.

The Guardian Ad Litem's concerns over the new information in conjunction with the concern for the safety of the children prompted a motion to increase the GAL fees on March 7, 2013 and a continued investigation. The respondent's suspicions were accurate and most concerns were not defended by the petitioner when she was given an opportunity to rebut. With the help of the respondent's resources, the GAL was finally able to get a hold of the petitioner's boyfriend's current wife, Jessica Castellanos. Mrs. Castellanos sorted out most of the dishonesties the petitioner and Mr. Rodriguez had been trying to hide through the course of these proceedings by directly speaking to the GAL herself. Mr. Rodriguez has no visitation with his children and the oldest child is afraid to see him and the youngest child does not know him. The oldest child is currently under the care of a psychologist to address these ongoing issues.

The guardian ad litem created an amended report, filed on June 11, 2013, recommending that the children's custodial parent be the respondent, Mr. Luis Melendez. Both the respondent and the GAL have reservations about the children being left alone with Mr. Rodriguez, but it is also a concern that Mr. Rodriguez has never been afraid, prior, to act on his DV compulsions when there are children or adults present. Mr. Rodriguez has also verbally threated the respondent three times since the beginning of these proceedings. The final parenting plan included a statement that the

children were never to be left alone with Mr. Virgilio Martin Rodriguez until he had a DV assessment and completed any recommended treatment.

C. Summary of Argument

The court did not err when making a ruling against making a major modification of the parenting plan. The court did not err when granting the relocation of the minor children The trial court did not err on findings of fact on each factor because there was substantial evidence presented on each factor and the oral articulations reflect that it considered each factor.

D. Argument

The order approving the relocation was properly made and should be upheld. A trial court must consider all 11 statutory factors in child relocation matters to determine if a detrimental effect outweighs the benefits to both the child and the parent wishing to relocate. Each factor has equal importance, Each factor has equal importance, and they are not weighted or listed in any order but rather provide a balancing test between the competing interests and circumstances that exist when a parent wishes to relocate. The trial court must enter specific findings on each factor, or parties must have presented substantial evidence on each factor with the trial court making findings and oral articulations that reflect its considerations of each. A trial court abuses its discretion when it fails to consider each factor." McNaught, supra at 556. A trial court decision is not manifestly unreasonable if it is within the range of acceptable choices presented. In re Parentage of Schroeder,

106 Wn. App. 343, 349, 22 P. 3d 1280 (2001). "Because of the trial court's unique opportunity to observe the parties, the appellate court should be extremely reluctant to disturb child placement decisions." Schroeder, at 349. In this case, all statutory factors with covered through the verbatim report.

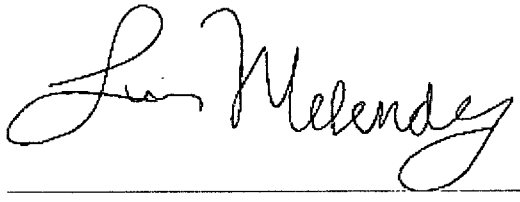
The trial court found that Araceli Felix, appellant, failed to rebut the presumption that the benefits of relocation outweighed any detrimental effects and permitted Luis Melendez to move with the children to Florida permanently. The court also found insufficient evidence to justify a major modification to the parenting plan.

E. Conclusion

The denied major modification of the parenting plan and the approval of the children's permanent relocation was properly determined, explained, and ordered. The orders must be upheld. The children have been in the State of Florida for over one year and have already started their second year of school.

August 14, 2016

Respectfully submitted,



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Signed at (city and state): ALTAMONTE SPRINGS, FL Date: 16 AUG 16

Signature of server

LUIS MELENDEZ

Print or type name of server